



EMPLOYMENT TRIBUNALS

Claimant

Mr E Creez

v

Respondent

Prune Enterprises Limited

Heard at: Birmingham

On: 17 August 2020

Before: Employment Judge Johnson

Appearances

For the Claimant: In person

For the Respondent: Ms R Hallworth (director) and
supported by Mr P Tiso (director)

JUDGMENT

1. The claim is struck out because it has no reasonable prospects of success.

REASONS

Background

2. At the closed preliminary hearing dated 25 June 2020, Employment Judge Gaskell ordered that this case be listed for an open preliminary hearing to determine the following issues:
 - (a) Whether, pursuant to Rule 37 of the Employment Tribunals Rules of Procedure 2013, the claimant's claim for unpaid wages should be struck out as having no reasonable prospects of success; or,
 - (b) In the alternative, whether pursuant to Rule 39, the claimant should be ordered to pay a deposit not exceeding £1,000 as a condition of continuing with claim for unpaid wages as the claim has little reasonable prospect of success.

3. The claimant was ordered to provide further information or documents with the Tribunal and the respondent, any further information or documents upon which he wished to rely upon to establish his entitlement to receive wages or salary said to be unpaid. The respondent was in turn ordered to provide any information or documents which it intended to rely upon in response.
4. Although the claimant provided his information after the date ordered by the Tribunal, he did provide in advance of the hearing, a document entitled 'Particulars of Claim', which provided background information, some submissions and appendices. He argued that his revised figure for his wages claim was £8,500 instead of the previous figure of £25,000, but provided very few supporting details.
5. The respondent provided its reply to this document on 13 August 2020 which resisted the claimant and argued that as the claimant had been a director and remained a shareholder of the respondent company, he could not claim employee or worker status. Additionally, they disputed the figure claimed for wages.
6. The claimant provided a further document commenting upon the respondent's reply on 14 August 2020.

The Hearing

7. The hearing was listed to take place by way of the Tribunals' 'Court Video Platform' (CVP) as it was an open preliminary hearing in public in accordance with Rule 56 (read in conjunction with Rule 53(1)(c) where the Tribunal is considering whether a claim should be struck out). Unfortunately, due to technical difficulties, it was not possible to use CVP.
8. As the difficulties related to my microphone not functioning correctly, it was not possible to use an alternative video platform such as 'Skype' or 'Zoom' and instead I offered the parties the opportunity to continue by way of a telephone hearing. I was conscious that this would make it more difficult for the case to be accessed by the public and consulted the parties. Both were willing to continue by way of a telephone hearing. I was satisfied that this was in accordance with the overriding objective under Rule 2 and in particular, it avoided unnecessary formality, allowed flexibility, avoided delay and was compatible with a proper consideration of the issues as well as saving expense. I was also satisfied that the hearing would not take place contrary to Rule 56 because any member of the public who having seen the Tribunal list and wished to attend the hearing, could have requested via the administration in Birmingham, to be invited to join the telephone hearing. I received no such notification during the hearing.
9. I reminded the parties that in accordance with the order of Employment Judge Gaskell, in considering whether I should apply Rules 37 or 39, (or any such order that I could reasonably make in accordance with my general case management powers under Rule 29 and the overriding

objective under Rule 2), I would not be hearing witness evidence and would not therefore be making findings of fact. Instead, I would discuss the documents provided by the parties and the claim form and response, hear submissions and make my decision.

10. I explained that to the parties that I could not make a decision lightly under Rule 37(1), given the very high standard that I had to apply to the decision, namely that the claim had no reasonable prospects of success (Rule 37(1)). Additionally, I could not make a decision to strike out unless I had given the claimant a reasonable opportunity to make representations (Rule 37(2)). I would therefore spend some time discussing the claim with the claimant and hear representations from the respondent.
11. I explained the slightly lesser standard applying to a decision to make a deposit order under Rule 39(1), namely that the claim had little reasonable prospect of success. I would also be required before making any such order, to make reasonable enquiries to determine the claimant's means, Rule 39(2). The claimant did confirm to me that due to Covid 19, he had no capacity to meet a payment required by a deposit order, but he could make a payment of £150 within 28 days.

Why the claim was struck out

Employment status

12. There was no dispute between the parties that the respondent company was incorporated on 31 May 2018. The company consisted of 2 shares with the claimant and Ms Hallworth owning one each. The claimant and Ms Hallworth were directors of the company, together with Mr P Tiso. The claimant ceased to be a director on 31 May 2019, which according to Companies House, was because he resigned.
13. The claimant and Ms Hallworth will both say that they worked together as Prune Productions which was a long established theatrical business where they were both self employed. Prune Enterprises Limited was only created in order that they could contract with Stratford Town Trust ('The Trust') to run the Stratford Playhouse. Prune Productions now appears to be the trading name of Prune Enterprises Limited.
14. The claimant alleges that his period of employment with the respondent was from 31 May 2018 until 31 May 2019.
15. I explained to the parties that even though the claimant had been a director and remained a 50% shareholder, there was no reason why he could not also be an employee of the respondent company at the relevant time. The question would be whether a contractual relationship could be identified by the claimant which was consistent with the status of an employee or worker. That would depend upon the claimant being able to demonstrate that there was likely to be evidence that he could rely upon which would support an argument that he was an employee or a worker.

16. I noted that the papers which he had provided did not include a written contract of employment or something which would suggest an orally agreed contract. The claimant confirmed that no such agreement existed, although he would argue that the directors envisaged that these contracts would be agreed at some stage in the future. By way of comparison, the respondent did formally employ Roger Golebiowski and Noel Clements, who were not directors of the respondent company.
17. The claimant had not provided any documentary information supporting how his hours of work were arranged, how he was paid, how tax and sick pay were paid and limited information was provided concerning the degree of control that he had over how he worked.
18. The claimant's submissions were that the directors worked in an 'ad hoc' way, they did what tasks they wanted and the claimant decided himself to take a role acting in the Christmas play and to take time off work in January 2019 to have a rest. There appeared to be no evidence to show that remuneration was calculated as salary on a regular basis or based upon tasks completed. The evidence available so far, was that Ms Hallworth would receive a grant from the Trust every quarter and the directors would be paid a basic payment for subsistence of around £5,000. There was no dispute that the directors paid their own tax and the claimant confirmed that statutory sick pay (SSP) when he was absent in January 2019, was claimed directly by him from the Department for Work and Pensions ('DWP'). There also appears to be no dispute that during 2018, the claimant could be working in excess of 100 hours per week, that this was well in excess of Working Time Regulations requirements and that the directors collectively worked long hours without any management control being applied.
19. There was no evidence of any disciplinary process being applied once the claimant was subject to criticism by the other directors and the Trust in 2019 and the claimant remained working as a director until May 2018 when he resigned.
20. I explained that I had to look at the claimant's case on its best possible terms. However, the submissions which I had heard from him and largely supported by the respondent, indicated the absence of any written agreement as to his role as a director and evidence that would support his claim that he was an employee or a worker. Simply put, this was a case where the claimant was not advancing a case which would indicate that he behaved as an employee or worker. His claim therefore had no reasonable prospects of success and it must be struck out.

The wages claim

21. Alternatively, if I was wrong concerning the claimant's 'employment status', he had still failed to provide particulars in support of his complaint for

unpaid wages. Details had been requested by the order of Employment Judge Butler on 9 November 2019 and in the case management order of Employment Judge Gaskell on 25 June 2020, that the claimant provide details of his entitlement to receive wages and the amount of wages or salary said to be unpaid. The documentation that he disclosed and the submissions which he made produced a reduction in his vague claim of £25,000 to £8,500. However, there was not documentation available to show how it was calculated and the basis upon which it could amount to an entitlement. No schedule of loss was provided and no evidence of how his earlier payments were calculated or received were provided either. On this basis, the claimant has failed despite a great deal of patience from the Tribunal to demonstrate that he has a quantifiable claim against the respondent as a worker. He was unable to provide details of any other additional information that might be available and I heard nothing from the respondent that they might have any documents available that could support the claimant's claim.

22. As a consequence, even if the claimant was able to demonstrate that his claim that he was an employee or worker had a better prospect of succeeding than 'no reasonable prospect of success', there was also no reasonable prospect of success in the claimant being able to prove that he had suffered unpaid wages by the respondent.

Possible other claims

23. I did mention to the claimant that it may be the case that as a former director, he could demonstrate a contractual right to payments from the respondent for his director's remuneration that was not paid. However, this was something which the Employment Tribunal did not have jurisdiction to hear. He would need to take legal advice or investigate this matter further, before deciding whether there was merit in commencing a claim in the civil courts.

Employment Judge Johnson
17 August 2020

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.